80-1631

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CROCE JACK GIRESI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a search warrant which authorized an unconstitutionally general search for items such as "United States currency" and "stolen property" nevertheless withstand constitutional challenge if other categories of items authorized by the warrant are not fatally general?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

CROCE JACK GIRESI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner, Croce Jack Giresi, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 25, 1981.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is reported at 488 F. Supp. 445 (D.N.J. 1980). No opinion was rendered in the United States Court of Appeals for the Third Circuit. The judgment order of that Court is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 25, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The indictment charged petitioner with violations of federal firearms statutes, 26 U.S.C. §§5861(d), 5861(i), and 5871. Two firearms silencers, unregistered and lacking the requisite serial numbers, were seized from petitioner's residence on July 12, 1978, pursuant to a search warrant issued that same day. The warrant, attached as Appendix B, authorized a search for and seizure of the following:

> CONTRABAND FIREARMS, UNITED STATES CURRENCY, PERSONAL TELEPHONE AND ADDRESS BOOKS, RECORDS OF FINANCIAL TRANSACTIONS, PERSONAL NOTEBOOKS, STOLEN PROPERTY, AND OTHER DOCUMENTS AND ITEMS WHICH ARE CONTRABAND, FRUITS, INSTRUMENTALITIES AND EVIDENCE OF A CONSPIRACY (18 USC 371) TO VIOLATE THE FIREARMS STATUTES (18 USC 922-a-1, DEALING WITHOUT A LICENSE; 18 USC APPENDIX 1202-a-1, FELONY POSSES-

SION); AND 26 USC 5861-d AND e, (UNREGISTERED FIREARM); AND CONSPIRACY TO VIOLATE 18 USC 1962 RELATING TO A RACKETEERING ENTERPRISE

The warrant was based entirely upon a 17-page affidavit of the same date, prepared by two agents who had participated in a lengthy investigation of a number of individuals, principally George Weingartner and Roger Krupinski. The investigation centered upon a bar known as the Truck Haven Rest in Kearny, New Jersey, managed by Weingartner, and a check cashing establishment in a trailer next door to the bar, run by Krupinski. At the same time that the search warrant was issued for the residence of petitioner, a United States Magistrate authorized pervasive searches, based upon the identical warrant language and 17-page affidavit, of other locations and persons.[1]

---

1. The affidavit contains nineteen separate allegations of specific criminal conduct, none of which concerns appellant. Twelve items refer to conduct by Weingartner, acting alone or in concert with others, and seven refer to Krupinski, acting alone or in concert with others.

The only two individuals named in the affidavit who were not accused of specific offenses are appellant Jack Giresi and Christina Weingartner, the wife of George Weingartner, who are the two individuals listed as the owners on the Truck Haven Rest liquor license. The entire mention of appellant Jack Giresi in the 17-page affidavit is set forth as follows:

> . . . this Bar is operated by George Weingartner, who utilizes the office space in the northeast portion of the first floor of the Bar. The liquor license, however, reflects that Jack Giresi and Christina Weingartner, wife of George, are the owners.
>
> • • •
>
> George Weingartner owns the Bar and conducts the fencing operation on a day-to-day basis, apparently working in conjunction with Jack Giresi.
>
> • • •

In the April 18, 1980, opinion of the district court, the judge considered petitioner's omnibus pretrial motion under Rule 12(b), F. R. Crim. P. At this time, petitioner moved, *inter alia*, to suppress the evidence seized from his residence pursuant to the July 12, 1978, search warrant. *United States v. Giresi*, 488 F. Supp. 445, 448 (D.N.J. 1980). Among the arguments petitioner made for suppression is that the warrant did not particularly describe the things to be seized in contravention of the Fourth Amendment which reads, in pertinent part, ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

On June 21, 1978, pursuant to prior discussions, Weingartner delivered to Your Affiant in his office as aforesaid, one box of Remington .38 caliber match ammunition and one box of Winchester Western 9mm. luger ammunition which he had concealed in his file cabinet. Subsequently, on July 7, 1978, Your Affiant met with George Weingartner and Jack Geresi (also spelled Giresi above). They requested Your Affiant to locate a third party, apparently in efforts to collect on some $8,000 worth of stolen property which was delivered by a New York suspect to the third party for purposes of fencing, which resulted in the third party failing to meet his obligation. Your Affiant advised Weingartner and Geresi that Your Affiant had no responsibility for the actions of the third party, after which Your Affiant paid Weingartner the sum of $19 for the ammunition purchased in the office on June 21, 1978. Weingartner indicated to Geresi during that conversation in the office that Your Affiant was the one who had purchased Geresi's ammunition. Your Affiant Luksic knows Geresi to be a co-owner with Weingartner in the Truckers Haven Bar and has visited Geresi's residence at 444 Forest Street, Kearny, New Jersey, during April of this year, at which time Your Affiant noted the presence of stereo speakers similar to the stolen stereo speakers sold to Your Affiant by Weingartner as previously described.

The previous description referred to in the line above was: "On April 11, 1978 Weingartner and DiScissio sold your Affiant Luksic two stolen stereo speakers for $40.00."

The district court found that the item "contraband firearms" was the most particular of all the categories of items sought in the warrant. 488 F. Supp. at 456 *et seq.* For purposes of this Petition for Writ of Certiorari, petitioner agrees. So does petitioner agree, only for the purpose of this petition and far more reluctantly, that what the district court labelled as "Category two" of the items described in the warrant, namely "personal telephone books, records of financial transactions, personal notebooks and other documents and items which are contraband, fruit, instrumentalities and evidence of a conspiracy (18 U.S.C. §371) to violate [enumerated and defined federal] firearms statutes . . . and a conspiracy to violate 18 U.S.C. §1962 relating to a racketeering enterprise," 488 F. Supp. 456, are set forth particularly enough to pass constitutional muster.[2]

The district court did rule, however, that "Category three" of the items listed in the warrant, namely, "stolen property" and "United States currency," was constitutionally infirm. That court held that "[a]n authorization to search for and seize stolen property not otherwise particularly described seemingly places no inherent restriction on what the officer may lawfully seize; the searching officer has discretion to seize all items of property that he *thinks* are stolen. Unlike 'contraband' the illicit nature of 'stolen property' is not usually apparent at first glance." 488 F. Supp. at 458. Similarly, the court also held that

2. It should be noted, however, that the court did recognize that the "Category two" descriptions were "[l]ess specific and consequently of greater concern" than the listing of "contraband firearms." "The nature of a search for [the "Category two" items], broadly categorized as private papers, is far reaching; the warrant authorizes the searching officer to inspect every piece of paper and document found in petitioner's residence in order to determine its relevance to the above-enumerated conspiracies." 488 F. Supp. at 457.

"the sufficiency of the description 'United States currency' is also questionable, for the authorization must have been based upon inferential reasoning that all currency found in the place searched is the fruit or evidence of the specified conspiracies." 488 F. Supp. at 459. The district court continued, "[t]his conclusion of partial descriptive insufficiency necessitates our reluctant appraisal of a difficult issue of Fourth Amendment jurisprudence for which there at first glance exists a curious division of opinion between the federal and state courts: must the particularly described "contraband firearms" silencers which are the subject matter of this indictment be suppressed because the warrant is tainted by the constitutionally infirm descriptions 'United States currency' and 'stolen property'?" *Id.* (footnotes omitted) The Court finally concluded that severance of the unparticular descriptions from the rest of the warrant should be allowed. Therefore, the two silencers seized pursuant to "Category one," namely, "contraband firearms," need not be suppressed; only those unlawfully seized pursuant to the constitutionally insufficient "Category three" descriptions were subject to suppression. *Id.*

After final judgment of conviction and sentencing[3] by the district court, petitioner appealed to the United States Court of Appeals for the Third Circuit as a matter of right pursuant to 28 U.S.C. §1291. By entry of a conditional plea of guilty, petitioner preserved his constitutional challenge to the search and seizure of items taken from his home. The Court of Appeals, however, affirmed the judgment of the District Court.

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3. Petitioner received an 18-month jail sentence.

REASONS FOR GRANTING THE WRIT

This case raises a fundamental issue of Fourth Amendment jurisprudence, an issue never before considered by the Supreme Court and one disparately treated in state and federal courts, namely, whether unconstitutionally general categories in a warrant can be severed in order to preserve the warrant against constitutional challenge.

The district court, in its opinion below, catalogued state court sentiment on this issue:

> The seminal and leading state court decision is that of the Supreme Court of California in *Aday v. Superior Court of Alameda County*, 55 Cal. 2d 789, 793, 13 Cal. Rptr. 415, 420, 362 P.2d 47, 52 (1961). *Aday* held that a warrant authorizing "the search for and seizure of" particularly described objects, "if otherwise valid, [is] not rendered illegal by" the search for and seizure of other listed items not particularly described in the warrant. Ibid. In the following breath, however, the *Aday* Court cautioned that the severance doctrine must be held unavailable where the inclusion of the unparticular descriptions made the warrant as a whole unconstitutionally general in nature:
>
> > We recognize the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirement of particularity, and that wholesale seizures might be made under them in the expectation that the seizure would in any event be upheld as to the property specified. Such an abuse of the warrant procedure, of course, could not be tolerated.
>
> *Ibid.* Other States which have considered this question have unanimously adopted *Aday's* reasoning. n.17. In

alphabetical order by State: *State v. Johnson,* 160 Conn. 28, 34, 273 A.2d 702, 705 (1970); *United States v. Ketterman,* 276 A.2d 243, 247 (D.C. App. 1971); *Butler v. State,* 130 Ga. App. 469, 203 S.E.2d 558, 562 (1973); *People v. Russell,* 145 Ill. App. 3d 961, 4 Ill. Dec. 579, 360 N.E.2d 515, 517-18 (1977); *People v. Haas,* 55 App. Div.2d 683, 390 N.Y.S.2d 202 (2d Dep't 1976) (accord, *People v. Mangialino,* [75 Misc.2d 698, 348 N.Y.S.2d 327, 337 (Cty. 1973)]); *State v. Sagner,* 12 Or. App. 459, 506 P.2d 510, 516 (1973); *State v. Clark,* 281 N.W.2d 412, 416 (S.D. 1979); *State v. Halverson,* 21 Wash. App. 35, 584 P.2d 408, 409 (1978). 488 F. Supp. 459-460.

The district court also recognized the existence of federal court decisions which disagree with the severance doctrine espoused in *Aday, supra. E.g., Application of Lafayette Academy, Inc.,* 462 F. Supp. 767, *aff'd* 610 F.2d 1 (1st Cir. 1979); *United States v. Hatfield,* 461 F. Supp. 57, *rev'd on other grounds,* 599 F.2d 759 (6th Cir. 1979); *United States v. Burch,* 432 F. Supp. 961, *aff'd without opinion,* 577 F.2d 729 (3d Cir. 1978). 488 F. Supp. 460.

In *Application of Lafayette, supra,* the district court noted that some courts, such as in *Aday,* have excised the offending items and sustained search warrants as to portions of items seized but "the best that can be said of those cases in these circumstances is that they represent a limited exception to the universal invalidity of general warrants." 462 F. Supp. at 772.

The *Lafayette* court stated that the First Circuit's position is to invalidate the whole warrant. *Id.* The Third Circuit impliedly adopted this position in its affirmance of *Burch, supra.* Surprisingly, the district court in *Giresi, supra,* refused to follow the dictate of its own circuit.

In *Burch*, the defendants were charged with possession of stolen automobile tires. The warrant authorized search of a garage for automobile tires and a van "and other unknown articles which are believed to be stolen from Penn Central Railroad . . ." The tires retrieved from the search were the only fruits the government wished to introduce at trial.

The government attempted to argue that since the warrant specifically referred to automobile tires believed to be stolen from the Penn Central and also specifically referred to a particularly 1975 Dodge van with a Delaware license plate, the tainted reference to other stolen property could be "severed," and therefore, the search was legal as to the tires. The Court stated:

> In effect, the Government asks the Court to act as if there were two searches, a legal search for tires and an illegal search for 'other unknown articles.' Such approach cannot be squared with the interests which the Fourth Amendment was designed to protect or with the facts in this case . . . . The inclusion of the specific reference to tires afforded no protection to Mr. Jaeger's right to be free from a general search. The search which the warrant authorized, and the search which in fact occurred, was no more narrow by reason of the inclusion of that reference than it would have been in its absence. When the agents entered Jaeger's property on the morning of May 7th they were authorized to search and seize anything they thought might have been stolen from Penn Central. In sum, there was only one search, that search, unlimited in scope as it was, violated the Fourth Amendment, and the tires were the fruit of that search. Accordingly they must be suppressed. (footnotes omitted) 432 F. Supp. at 964.

The *Burch* court explicitly rejected the holding in *Aday*, but the *Giresi* district court did not. 488 F. Supp. at 459. Instead, it sanctioned the occurrence of a search for "contraband firearms," particularly described in the warrant, simultaneously with a search for "stolen property" which it admitted placed "no inherent restriction on what the officer may lawfully seize; the searching officer has discretion to seize all items of property that he *thinks* are stolen." 488 F. Supp. at 458. The court also sanctioned a concurrent search for "United States currency," implying that "all currency found in the place searched is the fruit or evidence of the specified conspiracies." 488 F. Supp. at 459.

To allow a search for one item, particularly described, to proceed alongside unrestrained rummaging pursuant to general language in a warrant is to mock the Fourth Amendment guarantee "that those searches deemed necessary should be as limited as possible." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1970), 29 L.Ed.2d 564, 91 S. Ct. 2022, *reh. den.* 404 U.S. 874, 30 L.Ed.2d 120, 92 S. Ct. 26 (1970).

This is exactly what the district court sanctioned in defiance of Third Circuit law. For this reason, and to unify a field of law where synthesis is lacking, we urge this Court to grant this petition for a writ of certiorari.

CONCLUSION

For the reasons above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

/s/ Matthew P. Boylan
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Dated: March 25, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2221

UNITED STATES OF AMERICA

vs.

CROCE JACK GIRESI,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. CRIM. No. 79-00331)

ARGUED FEBRUARY 23, 1981

BEFORE: WEIS AND GARTH, *Circuit Judges* AND MILLER*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that

(1) The July 12 and July 14 warrants were general warrants which permitted an uncircumscribed rummaging among appellant's personal effects in violation of the particularity requirement of the Fourth Amendment; and

(2) The affidavit in support of the search warrant does not provide probable cause to support the search of Giresi's home; and

* The Honorable Jack Richard Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

(3) The defendant was entitled to an evidentiary hearing on the veracity of the warrant affidavit, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Joseph F. Weis, Jr.
Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS, Clerk

DATED: February 25, 1981.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

DOCKET No. 78-0222B-01

UNITED STATES OF AMERICA

vs.

The Residence of JACK GERESI,
444 FOREST STREET, KEARNY, NEW JERSEY

SEARCH WARRANT

To: ANY AUTHORIZED FEDERAL AGENT

Affidavit(s) having been made before me by SPECIAL AGENT CHARLES W. BOPP, JR. (ATF) that he has reason to believe that on the premises known as THE RESIDENCE OF JACK GERESI, 444 FOREST STREET, KEARNY, NEW JERSEY in the District of NEW JERSEY, there is now being concealed certain property, namely CONTRABAND FIREARMS, UNITED STATES CURRENCY, PERSONAL TELEPHONE AND ADDRESS BOOKS, RECORDS OF FINANCIAL TRANSACTIONS, PERSONAL NOTEBOOKS, STOLEN PROPERTY, AND OTHER DOCUMENTS AND ITEMS WHICH ARE CONTRABAND, FRUITS, INSTRUMENTALITIES AND EVIDENCE OF A CONSPIRACY (18 USC 371) TO VIOLATE THE FIREARMS STATUTES (18 USC 922-a-1, DEALING WITHOUT A LICENSE; 18 USC APPENDIX 1202-a-1, FELONY POSSESSION);

AND 26 USC 5861-d and e, (UNREGISTERED FIREARM); AND CONSPIRACY TO VIOLATE 18 USC 1962 RELATING TO A RACKETEERING ENTERPRISE and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of FOUR DAYS (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before HON. WILLIAM J. HUNT as required by law.

Dated this 12th day of July 1978.

/s/ William J. Hunt
HON. WILLIAM J. HUNT

• The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

No. 80-1631

MAY 27 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

CROCE JACK GIRESI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1631

CROCE JACK GIRESI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that firearms silencers seized from his home pursuant to a search warrant should have been suppressed because the warrant did not contain a sufficiently particularized description of certain other property.

1. On July 12, 1978, two firearms silencers were seized from petitioner's home by federal agents executing a warrant authorizing a search for and seizure of contraband firearms, stolen property, United States currency and various documents constituting evidence of illegal firearms transactions and racketeering (Pet. App. 3a-4a). Thereafter, in a four-count indictment filed in the United States District Court for the District of New Jersey, petitioner was charged with possession of unregistered firearms, in violation of 26 U.S.C. 5861(d), and possession of firearms not identified by serial number, in violation of 26 U.S.C. 5861(i). Following the district court's denial of petitioner's motion to suppress the two silencers (488 F. Supp. 445

(1980)), petitioner pleaded guilty to one count of the indictment, reserving (with the government's consent) the right to appeal the denial of his suppression motion. Petitioner was sentenced to a term of 18 months' imprisonment and was fined $1500. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

The warrant for the search of petitioner's residence authorized a search for and seizure of the following items:

> Contraband firearms, United States currency, personal telephone and address books, records of financial transactions, personal notebooks, stolen property, and other documents and items which are contraband, fruits, instrumentalities and evidence of a conspiracy (18 U.S.C. 371) to violate the firearms statutes (18 U.S.C. 922-a-1, dealing without a license; 18 U.S.C. appendix 1202-a-1, felony possession); and 26 U.S.C. 5861-d and e, (unregistered firearm); and conspiracy to violate 18 U.S.C. 1962 relating to a racketeering enterprise.

In his suppression motion, petitioner argued, inter alia, that the warrant failed to describe the items to be seized with sufficient particularity to satisfy the requirements of the Fourth Amendment.[1] The district court agreed with petitioner that some of the items to be seized, *i.e.*, "stolen property" and "United States currency," were not adequately described in the warrant, but ruled that other items,

---

[1]Petitioner also contended that the supporting affidavit did not supply probable cause to believe that the property sought would be located at petitioner's residence and that, under *Franks* v. *Delaware*, 438 U.S. 154 (1978), he was entitled to an evidentiary hearing on the veracity of certain representations made in the affidavit. Both courts below rejected these contentions (Pet. App. 1a-2a; 488 F. Supp. at 451-455, 461-462), and petitioner does not renew them here.

including the firearms that were the subjects of the indictment, were described in the warrant with the requisite specificity (488 F. Supp. at 455-459). The court then concluded that although the warrant was partially defective, the entire warrant was not invalid as it was possible to sever the defective portions from the sound portions (*id.* at 459-461). The court premised this conclusion on the finding that the warrant "as a whole, [was] not dangerously akin to a general warrant" because the defective portions "did not expand the scope of the search and seizure beyond that already lawfully authorized" by the sufficient portions and because "even the constitutionally deficient descriptions did not authorize a search for evidence of crimes other than those specifically enumerated * * * in the warrant itself" (*id.* at 461). Accordingly, the court refused to suppress the two firearms silencers that were seized pursuant to the clearly sufficient portions of the warrant.

2. Petitioner contends that because some items were insufficiently described in the warrant the entire warrant was tainted, and therefore everything seized in the course of its execution must be suppressed.[2] Petitioner recognizes that the decision below is in accord with the decisions of all of the state courts that have considered this question. In refusing to suppress evidence seized pursuant to a partially defective warrant, the state courts have, in appropriate circumstances, permited the invalid portions of a search warrant to be severed from the valid portions.[3] Petitioner asserts, however, that several federal district courts have refused to adopt this "severability" doctrine, and he urges

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[2]Petitioner concedes (Pet. 5) that the warrant's descriptions of contraband firearms and of books and records constituting evidence of enumerated crimes were sufficiently particular to satisfy the requirements of the Fourth Amendment.

[3]The state court decisions are listed in the district court's opinion (488 F. Supp. at 459-460 & n.17; see Pet. 7-8).

this Court to grant his petition in order to resolve this issue. We submit that the "severability" doctrine as applied by the district court below is in accord with a proper understanding of Fourth Amendment law and that at the present time there is no conflict between federal and state appellate courts on this issue warranting review by this Court.

In *Aday* v. *Superior Court of Alameda County*, 55 Cal. 2d 789, 797, 362 P.2d 47, 52, 13 Cal. Rptr. 415, 420, (1961), the California Supreme Court rejected the argument that a warrant that properly described two obscene books by name but improperly described other items was invalid as a whole. The court pointed out that, to hold otherwise, "would mean that the seizure of certain articles, even though proper if viewed separately, must be condemned merely because the warrant was defective with respect to other articles." *Ibid.* The court concluded that, in the circumstances presented (*ibid.*),

> [t]he invalid portions of the warrant are severable from the authorization relating to the named books, which formed the principal basis of the charge of obscenity. The search for and seizure of these books, if otherwise valid, were not rendered illegal by the defects concerning other articles.

As Professor LaFave has explained, "the *Aday* rule is sound; it would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well." 2 W. LaFave, *Search and Seizure* 111-112 (1978). Moreover, as the district court observed (488 F. Supp. at 460 n.18), many federal courts have permitted severance in the analogous situation where items other than those described in the warrant have been unlawfully seized. See, *e.g.*, *United States* v. *Dunloy*, 584 F. 2d 6, 11 n.4 (2d Cir. 1978); *United States* v. *Forsythe*,

560 F. 2d 1127, 1134 (3d Cir. 1977); *Brooks* v. *United States*, 416 F. 2d 1044, 1050 (5th Cir. 1969), cert. denied, 400 U.S. 840 (1970). Cf. *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976).

Whether the severability doctrine is applicable to a particular search, however, depends upon the facts of the case. If an item seized in plain view in the course of a search under a partially defective warrant would not have been discovered but for the offending language in the warrant, then the seized item should be suppressed as evidence. But this problem is not present where, as here, the seized items have been particularly described in the warrant.

Petitioner relies on two district court cases, *Application of Lafayette Academy, Inc.*, 462 F. Supp. 767 (D. R.I. 1978), aff'd, 610 F. 2d 1 (1st Cir. 1979), and *United States* v. *Burch*, 432 F. Supp. 961 (D. Del. 1977), aff'd mem., 577 F. 2d 729 (3d Cir. 1978), in support of his claim that some federal courts have disagreed with the rule permitting severance. Contrary to petitioner's claim, however, the court in *Lafayette Academy* did not reject the severability doctrine outright, but simply held that severance was inappropriate in the circumstances of that case, as "major drastic corrective surgery" would be required "to cure the constitutional maldadies" from which the warrant in question suffered. 462 F. Supp. at 772. Indeed, in affirming the district court's decision in *Lafayette Academy*, the First Circuit did not reach the severability question because it held that the warrant was defective with respect to all of the items named therein. 610 F. 2d at 6. Here, on the other hand, the district court specifically found that severance was appropriate because the defective portions of the warrant did not expand the scope of the search beyond that authorized by the valid portions of the warrant. 488 F. Supp. at 461.

Admittedly, the district court in *United States* v. *Burch*, *supra*, stated that it was "not persuaded" by the reasoning of

the courts that had adopted the severability doctrine (432 F. Supp. at 964 n.2), and it excluded evidence seized pursuant to a specific provision of a warrant where other provisions of the warrant were not sufficiently particular. In light of the court of appeals' affirmance of the district court's decision in the instant case, however, it appears that the district court decision in *Burch* does not reflect the current state of the law in the Third Circuit.[4] Accordingly, because there is no conflict at present between state and federal appellate courts on the question,[5] the issue does not warrant this Court's review. See generally R. Stern & E. Gressman, *Supreme Court Practice* 278-280 (5th ed. 1978).

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[4]To the extent that the Third Circuit's affirmance of the district court's decision in this case conflicts with its affirmance in *Burch*, that intra-circuit conflict is for the court of appeals to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[5]In *United States* v. *Hatfield*, 461 F. Supp. 57 (E.D. Tenn. 1978), rev'd on other grounds, 599 F. 2d 759 (6th Cir. 1979), the district court suppressed business records and guns that were seized from a gun dealer pursuant to a warrant that it found to be partially invalid (the court determined that the affidavit supporting the warrant justified a search for the records, but not for the guns). Citing *United States* v. *Burch*, *supra*, the court suppressed all of the evidence on the ground that it was "tainted by the overbroad warrant." 461 F. Supp. at 58. On appeal, the Sixth Circuit reversed the district court's holding that the affidavit failed to establish probable cause to search for the guns. The court therefore specifically declined to decide whether the Constitution permits a partially defective warrant to be "severed" in order to uphold a search for items seized under the warrant's valid portions. 599 F. 2d at 762.

It is therefore respectfully submitted that the petition fo a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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